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WAR AND LAW

J. K. Mikliszewski¹

Preliminary

The following will set forth what Poland has introduced into the field of her national legislation for the safeguard of peace. It explains the repressive and preventive system that Polish science and law have adopted against the scourge of war. These preventive measures failed only through the fault of the enemy who resorted to force. By perpetrating his hideous assault he has put himself out of the law. When the Allies took up arms, they did it for the restoration of the peace that had been so treacherously violated. They are making a war of peace.

The repression of martial aggressive activities introduced by the Polish legislator had a preventive character. It remains in suspension for the time being as the wrong has already been done and war is the only way to repair it. The pacific law will again be given its power. What I say here is to do homage to the Polish legislator for his meritorious work and to prepare the basis for future peace.

Article 113 of the Polish Penal Code

After the grave trial of 1914-1918 which was then believed to be the "war to end wars" men of good will of all countries wanted to restore and to consolidate peace upon everlasting foundations of justice, which seemed to be represented by International Law. The struggle of law against war made the state a moral person, responsible for violations committed against another state. Collective responsibility for the state-aggressor, determination and application of proper sanctions to the particular state—such were the problems under discussion by those who were warring against war by the aid of law. The League of Nations pact, as well as international treaties, concluded afterwards, was conceived in this spirit.

Now surely this was a correct viewpoint, but incomplete.

The International Law workers are not blameworthy. I am not unacquainted with the difficulties of all kinds that they had to overcome; I know very well that they were not able to take proper measures against predatory states, because they were relying only on the free agreement of governments and could not enforce sanctions. I am asserting only that the battle law made against war could not be entrusted altogether to International Law

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for many reasons. It was necessary to employ the national laws of particular countries. These laws do not depend on diplomatic courtesy, but on severity of justice; they would be able to put law into the service of peace.²

The Polish legislator was the first to recognize the necessity of employing in the struggle both International and national law against fomentors of imperialist war.

It is impossible to discuss in detail all the legal modalities by which the Polish legislator undertook to contribute to the maintenance of peace between nations. It will be sufficient to recall the most significant one to illustrate the pacific spirit by which Poland was always inspired. This is Article 113 of the Polish Penal Code, promulgated in 1932, as follows:

"Article 113, Sec. 1 He who incites publicly to a war of aggression is punishable by imprisonment for not more than five years.

"Sec. 2 The prosecution is undertaken only when the act indicated in Section 1 is punishable in the country against which the incitation is directed."

This new crime is one of the most interesting legal constructions of Poland. Its history is worth relating. It was born with the motion presented by the Polish delegation at the first International Conference for the Unification of Criminal Law which took place at Warsaw, in 1927. In this motion, which was founded on very solid juridico-repressive arguments, the authors proposed in the name of "the security of culture and civilization," to include in the list of *Delicta Iuris Gentium*, that was elaborated during the Conference, the offence of spreading war-like propaganda. A committee was appointed by the Conference to examine thoroughly the proposed offence and to report at another Conference that was to be held later.

This daring proposition that was animated by the pacific spirit of the Polish jurists caused a lively exchange of ideas in legal publications of a great number of countries. It had also a loud repercussion among those who were preparing texts on positive law, even in countries of this hemisphere. The Codification Commission of Poland which at that time was elaborating a project for a unified penal code for all territories of Poland, inserted the offence of aggressive martial agitation in the list of delinquencies of the Law of Nations. That was to form an article in the general part of the project, as well as to be a corresponding text in its

² The thesis set forth here about the co-operation of national law in the work of peace should be clearly understood. Therefore the writer refers the reader who is interested in this question to the report he presented on this matter, as the Polish delegate, at the Congress of International Studies at Paris, in 1937, and which was published in the Acts of the same Congress (*Edit. Intern.* 1938, Paris), as well as in *Revue de Science Criminelle et Droit Pénal Comparé*, Jan.-Feb. 1938.

special part, in the chapter entitled: "Offences against exterior interests of the state and against international relations."

In 1930 the question came back to the International Forum of the International Conference for the Unification of Criminal Law at Brussels. On the order of the day was the question of aggressive war propaganda. Very animated debates arose about this problem, first in the committee, and afterwards at the plenary session of the conference. Polish delegates stoutly maintained that the offence under discussion should be recognized as an international one and, thanks to their efforts, the Conference was about to agree, without reservation, to include the crime in the proposed international legislative text. But in view of the unyielding attitude of the Roumanian delegation, they were obliged to insert a "clause of legislative analogy" which, although it reduced in certain measure the importance of our proposal, did not detract from its character as an offence against the Law of Nations.

Taking into account the text adopted by the Conference and considering the fact that the Polish legislator has always been particularly careful to apply in practice resolutions of international juridical meetings, the Codification Commission omitted, in the definitive project of the Penal Code, the letter (codicille) regarding war propaganda in the enumeration of *delicta juris gentium* of art. 9, and added to art. 113 the restriction as to reciprocity just as it was agreed to by the Brussels Conference. Thus article 113 stood as quoted above.

I cannot delve too deeply into all the questions raised by the interpretation of article 113: the legal bases, constitutive elements, sanctions to be applied, etc.³ I call attention only to the fact that the Polish law envisioned a relatively severe penalty for war propaganda which shows the great importance it attached to the repression of warlike campaigns. I insist upon the character of *delicta juris gentium* that the Polish law gave the offence in question, particularly because certain writers, in Poland and abroad, have tried to attack it.

Let us remember that under the term *delicta juris gentium* are included offences which are subject to the system of universal right of punishment. This means that the authors of the acts in question are judged by the authorities of the country where they are caught, irrespective of their nationality, or of that of their victim, or of the place where the crime was done. Among these delinquencies one generally includes piracy, slave-trade, white slave-trade, etc. On the one hand, these crimes are so heinous that they must meet a severe reaction anywhere, and on the other hand, as they are generally committed on an international scale, all the countries

³ See: K. Mikliszanski, *Le Droit Pénal International d'après la Législation Polonaise*. Paris, Sirey, 1935, pp. 98 ff.

in the world are interested in their repression, whoever the criminal and whatever the place. Now, propaganda which preaches hatred between peoples, promotes aggression against small countries, and excites the pride of conquest, bears well the same marks of abomination and public danger as the afore-mentioned offences. Therefore, there is no reason why they, too, should not be ruled by a system of universal repression.

The purpose of the juridico-repressive protection instituted by Article 113 of the Polish Penal Code was to safeguard culture and civilization, the security of millions and millions of human lives, and to preserve the invaluable acquisitions of spirit and work that a war of invasion would deliver to death and destruction; it was, in a word, the defence of peace. Now peace is not the concern of any single country. All countries without exception in every part of the world are interested in its inviolability. The consciousness of man cannot remain indifferent to a massacre of people and values, even when this massacre does not hurt us directly. Innocent human blood shed by infuriated aggressors in any place on the earth is a disgrace to all mankind. War, being a phenomenon that affects all humanity, it seems logical that the repression of acts which are aimed at provoking war must have a universal significance. Such is the moral aspect of the question. England and France understood it—they who from the very moment of aggression put themselves on the side of the victim, though the aggression had not been directed immediately against them.

Taking now the selfish and so-called practical point of view of the state, the universal significance of every war becomes still more obvious. Indeed, considering the political and economic structure of states nowadays, the interdependence and interpenetrations of relations and interests of all countries, one would be quite naive—believing that war could be localized in one place on the earth. On the contrary, in face of war, one is never able to state precisely in advance how many and what countries will be set afire. Thus, whenever war is declared by any country in the world, every state can rightly deem its own peace to be in danger, and ought, in the interests of self-defense, to take a position against the aggressor, even if not immediately threatened. Those who still believe that their country, big or small, far or near, will be able to keep strict neutrality in a conflict between belligerent powers must consider this proposition and all its consequences: war is world war; nobody will escape it.

It is in the spirit of these considerations, as shown by the preparatory work of the Codification Committee, that Article 113 of the Polish Penal Code was conceived. The text of the article sets forth the universal character of the particular crime. Indeed, the

law does not speak merely of incitation of the Polish state to aggressive war, but of incitation of any state thereto. The Polish legislator shows thus his deep sense of solidarity among peoples. On the other hand, the offence of aggressive war propaganda being an offence against the Law of Nations, the place of its perpetration as well as the nationality of the author of the act was ignored. An alien who engages in provocative activities intended to lead Poland or any other state to violate the territory of any state in the world, comes under Article 113 of the Penal Code—if he is found in Polish territory, of course. In other words, the offence of aggressive war agitation was like all *delicta juris gentium*, within the jurisdiction of the *iudex deprehensionis*. Such were the stern preventive measures Polish legislation took against the imminent danger of war.

As to the clause stipulated by Article 113, Section 2, regarding reciprocity, it does not alter the universal character of the delinquency in question. It constitutes, rather, a measure of tactics dictated by legislative policy that aims to induce the greatest possible number of countries to introduce analogous national sanctions against agitators hired by depredatory dictators. Indeed, it would not be either rational or prudent to protect a state against conquest propaganda directed against it, while on its own territory activities of this kind aimed at another state would remain quite permissible.

Article 113 of the Polish Penal Code marks a date in the history of the struggle that Law makes against war. For, as I see it, it was the first attempt to engage the national laws of different countries at the side of International Law in this struggle. It brings out Poland's sentiments of sincere loyalty toward her neighbors and her attachment to the cause of world peace. These sentiments and this attachment have been perfidiously betrayed and monstrously desecrated. The crime will be mercilessly expiated. But after the victory, Poland, in full solidarity with the Allies, will build the reconquered peace again upon Right and upon the imminent justice of men.